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No Appeal: The U.S.-U.K. Supplementary Extradition Treaty's Effort to Create Federal Jurisdiction

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I. INTRODUCTION

British authorities charged Curtis Howard, a U.S. citizen, with a murder committed on English soil. Because Howard had returned to the United States, they sought his extradition pursuant to the extradition treaties between the United States and the United Kingdom. In response to the British request, U.S. federal authorities filed a complaint in the District of Massachusetts on behalf of the British government. In compliance with local rules,[1] the complaint was referred to a magistrate, who ruled that Howard was extraditable. The district court agreed with the magistrate's ruling,[2] and the First Circuit affirmed.[3]

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* Assistant Professor of Law, University of Pittsburgh School of Law. I am grateful for comments that Valerie Epps made on an earlier draft. This Article derives from two larger, ongoing projects. The first addresses the early history of the doctrine of self-executing treaties, with a focus on the role of extradition in that history. The second considers the ability of treaties to expand or contract federal court subject matter jurisdiction. Curtis Bradley, Richard Fallon, David Sloss, and Carlos Vázquez have made helpful suggestions as I have thought about these issues, and Jeffrey M. Murray has provided able research assistance. I also have benefited from a Dean's Summer Scholarship from the University of Pittsburgh School of Law. Finally, I should note that, as of the date this Article went to press, the United States and United Kingdom have signed a new extradition treaty. See http://www.usdoj.gov/opa/pr/2003/ March/03_ag_196.htm (last visited Sept. 21, 2003). Because the text of the treaty has not been submitted to the Senate, I do not know whether or how the new treaty—assuming it is ratified—will eventually affect the appeal provisions of the current Supplementary Treaty.

1. *See* RULES FOR MAGISTRATE JUDGES IN THE U.S. DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS 1(e), *available at* http://www.mad.uscourts.gov/LocPubs/magrules.htm (last visited Sept. 21, 2003).

2. *In re* Howard, 791 F. Supp. 31 (D. Mass. 1992).

3. *In re* Howard, 996 F.2d 1320 (1st Cir. 1993).

Nothing about these proceedings seems unusual except that the goal was to send Howard back to the United Kingdom to face murder charges in British courts. Yet the fact that *Howard* was an international extradition proceeding changes everything. Extradition proceedings are often described as "sui generis"[4] because they differ so much from traditional federal judicial proceedings. For example, neither side may take a direct appeal from an extradition decision. No statute provides federal district or appellate courts with subject matter jurisdiction to review these decisions.[5]

In the absence of a jurisdictional statute, the district and appeals courts in *Howard* asserted jurisdiction directly under a treaty. Both courts assumed that Article 3(b) of the Supplementary U.S.-U.K. Extradition Treaty (Supplementary Treaty) vested them with subject matter jurisdiction over appeals from magistrate decisions.[6] If the plain language of the Supplementary Treaty is the only touchstone, the courts were clearly correct. Article 3(b) of the Treaty purports to create the necessary jurisdiction in no uncertain terms: "[a] finding under paragraph (a) shall be immediately appealable by either party to the United States district court, or court of appeals, as appropriate."[7] Other courts have agreed with *Howard* that the plain language of the Supplementary Treaty provides them with appellate jurisdiction.[8]

The treaty language is only the beginning of the analysis, however. The Supplementary Treaty's attempt to create jurisdiction must be measured against the prevailing doctrine that "[f]ederal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree."[9] Therefore, if federal

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4. *See* United States v. Doherty, 786 F.2d 491, 498 (2d Cir. 1986).

5. *See In re* Mackin, 668 F.2d 122 (2d Cir. 1981); *see also infra* notes 24–26 and accompanying text.

6. *See* Supplementary Treaty between the Government of the United States of America and the Government of the United Kingdom and Northern Ireland, June 25, 1985, U.S.–U.K., T.I.A.S. No. 12,050, at 7–8 [hereinafter Supplementary Treaty]; *Howard*, 791 F. Supp. at 33–34; *Howard*, 996 F.2d at 1325–27.

7. Supplemental Treaty, *supra* note 6, at 8.

8. *See In re* Artt, 158 F.3d 462, 464, 468 (9th Cir. 1998), *withdrawn*, 183 F.3d 944 (9th Cir. 1999), *dismissed as moot*, 249 F.3d 831 (9th Cir. 2000); *In re* Smyth, 61 F.3d 711, 713 (9th Cir. 1995); *see also infra* notes 72–82 and accompanying text.

9. Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 377 (1994) (citations omitted).

courts may obtain subject matter jurisdiction only from a statute that falls within the scope of Article III, then the Treaty—a product of Presidential negotiation and Senate consent—is insufficient. Nor does it suffice to say that treaties can have the same force and effect as statutes under the Supremacy Clause. If Congress controls federal court jurisdiction, then a statute—the product of bicameralism and presentment—is a necessary prerequisite for federal court jurisdiction.

The obvious response is to claim that extradition treaties not only have the force of law but are also self-executing,[10] so that no statute is necessary to vest federal courts with subject matter jurisdiction over issues relating to extradition. Yet, this response may claim too much. If a self-executing treaty obviates the need for a statutory grant of subject matter jurisdiction, then Congress no longer has exclusive control over federal court jurisdiction.

The Supplementary Treaty and the handful of cases decided under it have received significant attention for their impact on the political offense exception to extradition and the rule of non-inquiry.[11] No one has squarely addressed the Treaty's effort to create federal subject matter jurisdiction.[12] This Article demonstrates that the appellate jurisdiction provisions of the Supplementary Treaty contradict current federal courts doctrine by undermining congressional control of federal court jurisdiction. As a result, the Treaty's appeal provisions cannot be enforced without expanding the doctrine of self-execution, which, in turn, requires greater attention to the meaning of self-execution and the history of international extradition litigation.

Part II of this Article describes the extradition process, the adoption of the Supplementary Treaty, and the handful of cases decided under it. Part III discusses the Supplementary Treaty's conflict with the doctrine of congressional control of federal court jurisdiction. Part IV first considers whether the doctrine of treaty

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10. *See* 6 MARJORIE M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 734 (1968).

11. *See infra* notes 21, 22 (discussing the political offense exception and the rule of non-inquiry); *see also infra* notes 60, 61 (collecting articles discussing the Supplementary Treaty).

12. The Ninth Circuit came close in *In re* Artt, 158 F.3d 462 (9th Cir. 1998), *withdrawn*, 183 F.3d 944 (9th Cir. 1999), *dismissed as moot*, 249 F.3d 831 (9th Cir. 2000), as did Valerie Epps in her consideration of whether the treaty allows two appeals, *see* Valerie Epps, *International Decision:* In re Requested Extradition of Smyth, 90 AM. J. INT'L L. 296 (1996).

self-execution can save the Supplementary Treaty's jurisdictional provisions and then discusses the impact that the history of extradition litigation may have on the debate over self-execution.

I should note that my analysis here is deliberately formal, in part because of the Supreme Court's strong statements about congressional control of federal court jurisdiction. Thus, I present the issue as a clash between the doctrine of congressional control and the presumption of treaty self-execution, where one doctrine must give way. Within these parameters, I am confident that congressional control of federal court jurisdiction would trump self-execution, with the result that the Supplementary Treaty's jurisdiction-conferring provisions are unenforceable without implementing legislation.[13] At the same time, however, I am not arguing that treaties should not be able to alter federal court jurisdiction. My claim is simply that current doctrine forbids such a conclusion. If we want treaties to be able to change federal court subject matter jurisdiction without implementing legislation, we must first lay the groundwork for a more flexible doctrine.

II. EXTRADITION AND THE SUPPLEMENTARY TREATY

A. The Extradition Process in the United States

Any nation that has entered into an extradition treaty with the United States may make a formal diplomatic request for extradition.[14] The State Department reviews the request and generally forwards it to the Department of Justice, which sends it to the relevant local U.S. Attorney's office. The U.S. Attorney's

13. I should also note that the same result would even more obviously apply to executive agreements but not to congressional-executive agreements. For a discussion of these different agreements, see LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 215–30 (2d ed. 1996).

14. The statute allows a country to file its own complaint, see 18 U.S.C. § 3184; Grin v. Shine, 187 U.S. 181, 193–94 (1902); 6 WHITEMAN, *supra* note 10, at 905–06, but "[a]ll extradition treaties currently in force require [the use of] diplomatic channels," U.S. Dep't of Justice, CRIMINAL RESOURCE MANUAL § 612 (1997). However, Congress sometimes permits extradition without a treaty. *See, e.g.*, 18 U.S.C. § 3181(b) (2000) (allowing extraditions to the international tribunals for Rwanda and Yugoslavia). As a matter of practice and doctrine, the power to extradite is derived only from treaties or statutes; the executive branch has no plenary authority to extradite. *See* John T. Parry, *The Lost History of International Extradition Litigation*, 43 VA. J. INT'L L. 93, 104–24 (2002).

office represents the country seeking extradition[15] and commences the proceedings by filing a complaint in federal district court seeking the arrest, detention, and extradition of the alleged fugitive.

Despite the fact that 28 U.S.C. § 1331 grants federal courts jurisdiction over "all civil actions arising under . . . treaties of the United States," the statute does not apply to extradition proceedings.[16] Instead, magistrates and district judges look to the federal international extradition statute, 18 U.S.C. § 3184, for their subject matter jurisdiction. Section 3184, which predates the grant of federal question jurisdiction, provides that "any justice or judge of the United States, or any magistrate authorized to do so by a court of the United States" may conduct an extradition hearing.[17]

Generally, the district or magistrate judge assigned to the case issues a warrant for the arrest of the fugitive and holds a hearing on the sufficiency of the evidence presented by the requesting country.[18] The Federal Rules of Criminal Procedure, Federal Rules of Civil Procedure, and Federal Rules of Evidence do not apply at the hearing.[19] The hearing departs from traditional judicial proceedings in other ways as well:

> First, 18 U.S.C. § 3190 permits the demanding country to introduce properly authenticated and certified ex parte depositions, etc., gathered at home. Second, the ex parte advantages of § 3190 are not available to the defendant. Third, the defenses available to the fugitive are extremely limited. The

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15. *See* U.S. Dep't of Justice, *supra* note 14, § 613; Parry, *supra* note 14, at 95 & n.3 (noting circumstances in which a country might use private counsel).

16. Contemporary courts insist extradition is not a criminal proceeding. *See* John G. Kester, *Some Myths of United States Extradition Law*, 76 GEO. L.J. 1441, 1443–47 (1988) (describing and criticizing this doctrine); *see also* M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 655 (3d ed. 1996) ("Extradition matters, however commenced, are recorded in the civil docket of the federal district court, even though the proceeding is deemed of a *sui generis* nature, having many characteristics of criminal proceedings."). As a result, the plain terms of 28 U.S.C. § 1331 could include extradition proceedings, if not for the separate statute and a history of construing extradition proceedings to be outside its scope.

17. *See* 18 U.S.C. § 3184 (2000); *see also* BASSIOUNI, *supra* note 16, at 36 (cataloguing the various amendments to the extradition statutes).

18. *See* 18 U.S.C. § 3184. State judges may hold extradition hearings, but examples are rare. *See* Parry, *supra* note 14, at 95 n.4.

19. *See In re* Smyth, 61 F.3d 711, 720–21 (9th Cir. 1995); FED. R. CRIM. P. 54(b)(5); FED. R. EVID. 1100(d)(3). The federal rules of civil and appellate procedure apply to appeals under the Supplementary Treaty. *See In re* Howard, 996 F.2d 1320, 1326 (1st Cir. 1993) (quoting treaty language providing for application of federal rules).

> fugitive, for example, cannot introduce evidence that contradicts the demanding country's proof; evidence to establish alibi; evidence of insanity; and evidence that the statute of limitations has run. Fourth, the actual guilt of the fugitive does not have to be established, but instead the demanding country need only show probable cause that he is guilty.[20]

The accused may contend that she has been accused of a political offense—such as treason, spying, or possibly common crimes committed for political purposes.[21] On the other hand, the rule of non-inquiry forbids U.S. judges from considering the fairness of the proceedings that await the accused in the requesting country.[22]

If the evidence is sufficient and the offense is prosecutable under the relevant extradition treaty, the judge certifies that the person is extraditable.[23] Settled doctrine prevents the extraditee from taking the case to the court of appeals.[24] The no-appeal rule also bars district courts from reviewing a magistrate's extradition decision.[25] This rule derives in part from the language of the statute, which states that the case should be sent to the Secretary of State if the judge finds in favor of extradition.[26]

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20. First Nat'l Bank of New York v. Aristeguita, 287 F.2d 219, 226–27 (2d Cir. 1960) (citations omitted), *vacated as moot*, 375 U.S. 49 (1963). For a detailed description of procedure and issues at the hearing, see BASSIOUNI, *supra* note 16, at 654–789. For a critical view of the entire extradition process, see Kester, *supra* note 16.

21. For an overview of the political offense exception, *see* BASSIOUNI, *supra* note 16, at 502–83; CHRISTOPHER L. BLAKESLEY, TERRORISM, DRUGS, INTERNATIONAL LAW, AND THE PROTECTION OF HUMAN LIBERTY 264–70 (1992).

22. *See* John Quigley, *The Rule of Non-Inquiry and the Impact of Human Rights on Extradition Law*, 15 N.C. J. INT'L L. & COM. REG. 401 (1990); Jacques Semmelman, *Federal Courts, the Constitution, and the Rule of Non-Inquiry in International Extradition Proceedings*, 76 CORNELL L. REV. 1198 (1991). The Supplementary Treaty creates a limited exception to this rule. *See infra* note 53 and accompanying text.

23. *See* 18 U.S.C. § 3184.

24. *See In re* Mackin, 668 F.2d 122 (2d Cir. 1981); *supra* note 5 and accompanying text. The no-appeal rule also applies if the judge decides against extradition, but the government is free to file a new complaint (put differently, res judicata does not apply in extradition proceedings). *See Mackin*, 668 F.2d at 125–30; *see also* Massieu v. Reno, 91 F.3d 416, 418 (3d Cir. 1996) (noting in the context of deportation proceedings that the government filed and lost four extradition requests); *In re* Atta, 706 F. Supp. 1032 (E.D.N.Y. 1989) (granting a second request for extradition after the first was denied).

25. *See* Ward v. Rutherford, 921 F.2d 286 (D.C. Cir. 1990) (holding habeas corpus provides the only opportunity for district court review of a magistrate's extradition decision).

26. *See* 18 U.S.C. § 3184 (requiring the judge or magistrate to certify a favorable extradition ruling directly to the Secretary of State).

Upon receipt of the certification of extraditability, the Secretary reviews the case and usually executes a warrant for surrender of the accused. However, the Secretary also has discretion to refuse surrender.[27] The accused may seek habeas relief before or after the Secretary executes the warrant,[28] but the court's review is limited to three issues: whether the trial judge had jurisdiction; whether the offense is within the treaty; and "whether there was any evidence warranting the finding that there were reasonable grounds to believe the accused guilty."[29]

The singular characteristics of the extradition process have fostered doubts about the nature of the proceeding before the judge. Some courts believe extradition is an Article III proceeding,[30] and at least one judge suggests it could be an Article II proceeding.[31] Under the dominant view, extradition is an Article I proceeding.[32] The debate largely turns on the fact that the Secretary of State may refuse extradition based on disagreement with the judge's legal conclusions.[33] According to several courts, the power to deny surrender is a form of executive review over the judge's decision.[34]

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27. *See In re* Howard, 996 F.2d 1320, 1325 (1st Cir. 1993) (describing the Secretary as "the ultimate decision maker"); LoBue v. Christopher, 893 F. Supp. 65, 68–70 (D.D.C. 1995), *vacated on jurisdictional grounds*, 82 F.3d 1081 (D.C. Cir. 1996); WHITEMAN, *supra* note 10, at 1027–28, 1046. The Secretary has exercised discretion against extradition in a handful of cases since 1940. *See* Parry, *supra* note 14, at 153 n.314.

28. *See* WHITEMAN, *supra* note 10, at 1020–23.

29. Fernandez v. Phillips, 268 U.S. 311, 312 (1925). Some lower courts have tried to loosen the standard in recent years, and the proper scope of extradition habeas remains the topic of debate. *See* Parry, *supra* note 14, at 153–58.

30. *See* DeSilva v. DiLeonardi, 125 F.3d 1110, 1113 (7th Cir. 1997); LoBue v. Christopher, 893 F. Supp. 65 (D.D.C. 1995), *vacated on jurisdictional grounds*, 82 F.3d 1081 (D.C. Cir. 1996).

31. *See In re* Kirby, 106 F.3d 855, 866 (9th Cir. 1996) (Noonan, J., dissenting); *In re* Smyth, 72 F.3d 1433 (9th Cir. 1996) (Noonan, J., joined by Pregerson, Reinhardt, and O'Scannlain, JJ., dissenting from denial of rehearing en banc).

32. *See* Lopez-Smith v. Hood, 121 F.3d 1322, 1327 (9th Cir. 1997); LoDuca v. United States, 93 F.3d 1100, 1105–09 (2d Cir. 1996); *In re* Mackin, 668 F.2d 122, 125–30 (2d Cir. 1981). For a discussion of how federal courts came to be so confused about the nature of extradition litigation, see Parry, *supra* note 14, at 125–50, 158–65.

33. *See LoBue*, 893 F. Supp. at 68–70.

34. *See LoDuca*, 93 F.3d at 1105–09; United States v. Doherty, 786 F.2d 491, 499 & n.10 (2d Cir. 1986); *Mackin*, 668 F.2d at 126–27, 129; *LoBue*, 893 F. Supp. at 70–73. *But see DeSilva*, 125 F.3d at 1113 (stating refusal to extradite is no different than other discretionary refusals to take advantage of a favorable judgment); *In re* Artt, 158 F.3d 462, 464 (9th Cir. 1998) (adopting *DeSilva*'s analysis), *withdrawn*, 183 F.3d 944 (9th Cir. 1999), *dismissed as moot*, 249 F.3d 831 (9th Cir. 2000); *see also* Parry, *supra* note 14, at 150–53 (discussing the history and nature of executive review).

Several inferences follow from the conclusion that the Secretary of State exercises executive review over extradition decisions. First, extradition proceedings are not cases or controversies within the meaning of Article III because the judiciary cannot render a final and conclusive judgment.[35] Second, the magistrates and district judges who preside over extradition hearings are not "courts" for purposes of Article III, precisely because their decisions are subject to executive review.[36] Finally, because extradition proceedings under the current statute are outside Article III, neither the general federal question statute[37] nor the general appellate jurisdiction statute[38] can apply to extradition proceedings.

These conclusions raise several issues about the roles that federal judges and magistrates play in extradition proceedings.[39] Most important for this Article is that, under the dominant view that extradition proceedings are outside the scope of Article III, the general appellate jurisdiction statute does not apply. Moreover, even if extradition is an Article III proceeding, the weight of doctrine and practice still precludes an appeal under § 1291— to my knowledge, no federal court has ever allowed a direct appeal in an extradition case.[40] Therefore, the district and appellate courts must locate another source of authority for

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35. *See* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 227–28 (1995) (holding Article III necessitates the judgments of federal courts be final and conclusive). Habeas corpus challenges to the validity of an extradition, on the other hand, are Article III cases and fall within the grant of jurisdiction to district courts. *See* 28 U.S.C. § 2241 (2003).

36. Judge Friendly explained that the extradition statute vests jurisdiction in "judges" acting pursuant to Article I, not "courts" acting under Article III:

> We thus need not consider whether, consistent with *Hayburn's Case*, 2 U.S. (2 Dall.) 408, 1 L. Ed. 436 (1792), Congress could constitutionally vest an Article III *court* with the nonjudicial function of issuing the certificate – nonjudicial because, as pointed out in *Mackin*, 668 F.2d at 136 n.9, the Secretary of State is not bound to extradite even if the certificate is granted.

United States v. Doherty, 786 F.2d 491, 499 & n.10 (2d Cir. 1986).

37. 28 U.S.C. § 1331 (vesting "district courts" with jurisdiction over "civil actions").

38. 28 U.S.C. § 1291 (allowing appeals only from "final decisions of the district courts").

39. *See* Parry, *supra* note 14, at 165–69.

40. In addition to the weight of history and practice, one could argue that an extradition proceeding is analogous to a preliminary hearing, making the court's decision not "final" for purposes of § 1291. *See* Kamrin v. United States, 725 F.2d 1225, 1227 (9th Cir. 1984) (stating the extradition certification "was not a final order warranting a direct appeal").

jurisdiction to hear extradition appeals.[41] The question, then, becomes whether a statute must grant that authority or whether a treaty can be sufficient.

B. The U.S-U.K. Supplementary Extradition Treaty

The Supplementary Treaty was a direct response to four cases in which federal judges refused to extradite individuals accused of committing violent crimes in the United States in support of Irish Republican Army efforts in Northern Ireland.[42] In each case, the accused claimed immunity from extradition to Britain under the political offense exception. During the litigation of these cases, Congress attempted to revise the extradition statutes. Proposals included allowing direct appeals from certification decisions, codifying or modifying the political offense exception, and relaxing the non-inquiry rule.[43] However, extradition reform efforts failed

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41. The possibility that extradition proceedings may be outside Article III would not prevent an Article III court from hearing appeals if its decision would be final and conclusive. *See* Richard M. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 933 (1988); Dallin H. Oaks, *The "Original" Writ of Habeas Corpus in the Supreme Court*, 1962 SUP. CT. REV. 153, 166; Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 227–28 (1995) (holding judgments of federal courts must be final and conclusive).

42. The four cases involved Joseph Doherty, Desmond Mackin, Peter McMullen, and William Quinn. *See* United States v. Doherty, 786 F.2d 491 (2d Cir. 1986) (rejecting government's effort to obtain declaratory relief from denial of extradition); *In re* Mackin, 668 F.2d 122 (2d Cir. 1981) (rejecting government's effort to take direct appeal from denial of extradition); McMullen v. United States, 989 F.2d 603, 610 (2d Cir. 1993) (en banc) (describing failed 1978 extradition proceedings); Quinn v. Robinson, 783 F.2d 776, 786 (9th Cir. 1986) (describing district court's grant of habeas on political offense grounds). For descriptions of the Supplementary Treaty as a response to these cases, see *Statement of Deputy Attorney General Lowell Jensen to the Senate Committee on Foreign Relations*, Aug. 1, 1985, *reprinted in* 131 CONG. REC. S10,787 (daily ed. Aug. 1, 1985); 132 CONG. REC. S 9,120 (daily ed. July 16, 1986) (statement of Sen. Lugar). By the time the treaty entered into force, the Ninth Circuit had ruled in habeas corpus proceedings that Quinn was not entitled to the political offense exception from extradition, *see Quinn*, 783 F.2d 776, and Mackin had long since been deported to Ireland, *see IRA Suspect Sent to Ireland*, N.Y. TIMES, Jan. 1, 1982, § 1, at 2. After a new proceeding under the Supplementary Treaty, the government was able to extradite McMullen. *See IRA Suspect Extradited to Britain*, U.P.I., Mar. 30, 1996; *McMullen*, 989 F.2d 603. Rather than reopen extradition proceedings against Doherty, the government deported him to England. *See* INS v. Doherty, 502 U.S. 314 (1992) (upholding Attorney General's refusal to reopen deportation proceedings).

43. *See* BASSIOUNI, *supra* note 16, at 657–58 (summarizing proposed revisions); *United States and United Kingdom Supplementary Extradition Treaty*, Hearings Before the Committee on Foreign Relations of the United States Senate, S. Hrg. 703, 99th Cong., 1st Sess. 72–78 (1985) [hereinafter *Foreign Relations Hearings*] (testimony of Rep. William

during the same period that the Senate was considering the Supplementary Treaty.

Some further context may also be relevant. Beginning with its consent to the Jay Treaty in 1795, the Senate has sporadically insisted on its ability to modify treaties by reservations, understandings, declarations, and other conditions.[44] More recently, the executive branch has included proposed conditions when it transmits human rights treaties to the Senate, and the Senate has usually adopted those or similar conditions.[45] Shortly after it consented to the Supplementary Treaty, moreover, the Senate—controlled by Democrats after the 1986 election—became involved in an intense debate with the Reagan administration over the Senate's power to play a role in defining this country's treaty obligations.[46] The Senate's treatment of the Supplementary Treaty presaged that debate.

The original version of the Supplementary Treaty was signed on June 25, 1985 and transmitted to the Senate the following month.[47] The primary goal of the Treaty was to narrow the political offense exception by listing crimes to which it would not apply. The draft Treaty encountered bipartisan resistance in the Senate and criticism from some commentators.[48] The Senate Foreign Relations and Judiciary Committees held four hearings on the Supplementary Treaty over the next several months. The hearings made clear that the Senate would not consent to it as negotiated, and several Senators called for modifications.[49]

Hughes) (discussing proposed revisions, including possible relaxation of the rule of non-inquiry).

44. *See* Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399, 404–10 (2000).

45. *Id.* at 414–16.

46. *See* Symposium, *Arms Control Treaty Reinterpretation*, 137 U. PENN. L. REV. 1351 (1989); John Norton Moore, *Treaty Interpretation, the Constitution, and the Rule of Law*, 42 VA. J. INT'L L. 163 (2001).

47. *See* Supplementary Treaty, *supra* note 6, at 1.

48. *Compare* Christopher L. Blakesley, *The Evisceration of the Political Offense Exception to Extradition*, 15 DENV. J. INT'L L. & POL'Y. 109 (1986) (criticizing the original version of the treaty), *with* Abraham D. Sofaer, *The Political Offense Exception and Terrorism*, 15 DENV. J. INT'L L. & POL'Y. 125 (1986) (State Department Legal Advisor's defense of the original version).

49. Senator Eagleton may have been the first to suggest modifying the treaty, and he proposed adapting some of the language of the failed revisions to the extradition statutes. *See Foreign Relations Hearings*, *supra* note 43, at 75–76 (statement of Senator Eagleton) ("I think the treaty before us is flawed and will either be rejected by this committee outright or will necessitate some amendment or amendments. . . . Suppose we took the guts of

Rather than reject the Supplementary Treaty or call upon the Administration to renegotiate it, several members of the Foreign Relations Committee drafted amendments. The Committee subsequently recommended that the Senate consent to the Treaty as amended.[50] According to Senator Lugar, Chairman of the Foreign Relations Committee, "[t]hese amendments were developed in close consultation with the administration and the British Government. While both governments would have preferred that the Senate approve the treaty as submitted, both were willing to accept the committee's changes."[51] After the

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the 1983 and 1984 Senate judiciary bill [on extradition] as a guideline for amending the supplemental treaty."); *see also id.* at 221 (statement of Senator Eagleton). Other Senators quickly agreed. *See id.* at 85 (statement of Senator Pell); *id.* at 158, 159 (statement of Senator Kerry). At least one witness also called for modifications to the treaty. *See Supplementary Extradition Treaty Between the United States and the United Kingdom of Great Britain and Northern Ireland*, Hearing Before the Subcommittee on the Constitution of the Committee on the Judiciary, United States Senate, S. Hrg. 523, 99th Cong., 1st Sess. 142 (1985) (statement of Prof. John F. Murphy) (advocating ratification, but only with a reservation allowing an inquiry into the fairness of the proceeding awaiting the accused in the requesting country). Murphy drew in part on Christopher Pyle's testimony before the Foreign Relations Committee. *See id.* at 141–42; *Foreign Relations Hearings*, *supra* note 43, at 109–11 (statement of Prof. Christopher Pyle).

50. *Supplementary Extradition Treaty with the United Kingdom*, June 25, 1985, U.S.-U.K., S. Treaty Doc. No. 99-8 (1985) [hereinafter *Treaty Report*]. Cherif Bassiouni described the Committee's rewriting of the treaty as "unprecedented." M. Cherif Bassiouni, *The "Political Offense Exception" Revisited: Extradition Between the U.S. and the U.K.—A Choice Between Friendly Cooperation Among Allies and Sound Law and Policy*, 15 DENV. J. INT'L L. & POL'Y. 255, 258 (1987) [hereinafter Bassiouni, *Political Offense*]. Specifically, Bassiouni noted that "to a great extent, the Senate departed from its constitutional role of advice and consent, and virtually took over the President's prerogative to make treaties by redrafting a treaty that had already been signed." *Id.* These concerns may be a bit overstated. Although the Senate's action was unusual, the President has the option not to ratify if he disagrees. *See* DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801 211 (1997); Bradley & Goldsmith, *supra* note 44, at 443–44 (providing an example of presidential refusal to ratify); David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075, 1160–61 (2000) (noting President Washington's doubts about ratifying the Jay Treaty after the Senate refused its consent to one article). Bassiouni's position may derive from his general opposition to the Senate's practice of attaching reservations to treaties. *See* M. Cherif Bassiouni, *Reflections on the Ratification of the International Covenant on Civil and Political Rights by the United States Senate*, 42 DEPAUL L. REV. 1169 (1993). *Compare* Moore, *supra* note 46, at 187 (declaring the Senate may, "attach understandings, reservations, international conditions to be agreed by the other party, or even require substantive amendment and revision of the treaty"). For additional discussion of this issue, *see* Bradley & Goldsmith, *supra* note 44, and sources cited therein.

51. 132 CONG. REC. S 9,148 (daily ed. July 16, 1986).

Senate gave its consent, President Reagan ratified the amended Supplementary Treaty.[52]

The amendments narrowed the categories of offenses excluded from the political offense exception in the original version of the Treaty. They also added a new Article 3. The new Article 3(a) relaxes the rule of non-inquiry:

> Extradition shall not occur if the person sought establishes to the satisfaction of the judicial authority by a preponderance of the evidence that the request for extradition has in fact been made with a view to try or punish him on account of his race, religion, nationality, or political opinions, or that he would, if surrendered, be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality, or political opinions.[53]

Furthermore, Article 3(b) declares: "A finding under paragraph (a) shall be immediately appealable by either party to the United States district court, or court of appeals, as appropriate."[54] Significantly, Article 3 does not disturb the Secretary of State's authority to review extradition decisions.

The Committee report and the Senate debate focused on the proper scope of the political offense exception and the modification to the non-inquiry rule.[55] The Supplementary

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52. Supplementary Treaty, *supra* note 6, at 1, 4.

53. *Id.* at 7; *Treaty Report*, *supra* note 50, at 10.

54. Supplementary Treaty, *supra* note 6, at 8; *Treaty Report*, *supra* note 50, at 10.

55. For example, the committee report identifies Senators Lugar and Eagleton as the authors of the amendments, but then reproduces a colloquy between Senators Biden, Kerry, and Lugar from a committee meeting as a guide to the proper scope of Article 3(a). *See Treaty Report*, supra note 50, at 4–5. During the debate in the full Senate, Senator Eagleton claimed primary authorship of Article 3(a) and declared that its scope was narrower than the Biden-Kerry-Lugar colloquy would indicate. *See* 132 Cong. Rec. S 9,166–67 (daily ed. July 16, 1986). Senator Lugar avoided agreeing with Senator Eagleton's claims of primary authorship, *see id.* at S 9,167, while Senator Pell acknowledged the important role played by Senator Eagleton "*as we all tried* to work out a possible compromise." *Id.* (emphasis added). On the second day of debate, several Senators attempted to refute Senator Eagleton's claims and to reassert the colloquy as the key to interpreting Article 3(a). *See* 132 Cong. Rec. S9252 (July 17, 1986) (statement of Senator Kerry); *id.* at S9259 (statement of Senator Levin); *id.* at S9260–62 (statement of Senator Biden) (disputing Eagleton's claim of primary authorship and his interpretation of Article 3(a)). Interestingly, when Senator Eagleton asked Senator Lugar whether he found "anything in my speech on article 3(a) which did violence in any way, shape, or form to the meaning of the supplementary treaty," Senator Lugar said only that "[t]he Senator's speech was eloquent and scholarly." *Id.* at S9252; *see also* Quigley, *supra* note 22, at 432–33 (concluding "the dominant view among the senators" was for an inquiry broader than Eagleton's interpretation).

Treaty's attempt to create federal court subject matter jurisdiction received little attention. The committee report only provided a description of how the appeal process would work, with an overriding concern for what rules would apply to the proceeding.[56]

During the debate, Senator Lugar revealed the Committee's intention in creating the appeal process:

> As the individual already has an effective right of appeal by way of filing a petition for a writ of habeas corpus, this section gives the Government a right of appeal it does not have under current extradition law. In view of the effect of a finding under article 3(a) in favor of the defendant, I believe the grant of appeal rights to the Government is warranted.[57]

Senator Hatch addressed the new appeals procedure in the course of opposing the Supplementary Treaty. Specifically, he objected to Article 3 as "a fundamental change in extradition practice and therefore a fundamental change in American legal procedure by means of the treaty process."[58] He also declared that he was "profoundly disturbed" by Article 3(b), because it would displace decades of extradition doctrine by establishing that "[t]he U.S. Government ordinarily, and just about always, does not have the right of appeal either by statute or by case law."[59]

Commentators have also focused most of their attention on the limits the Supplementary Treaty places on the political offense exception to extradition and the inroads it has made on the rule of

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56. The report stated,

> Because an initial finding may either be made by a Federal magistrate or Federal district court judge, Article 3(b) makes either the Federal Rules of Civil Procedure or Federal Rules of Appellate Procedure, "as appropriate," controlling on appeal. If the appeal is from a Federal magistrate's decision, it is to be lodged in Federal district court and the Federal Rules of Civil Procedure shall apply. If it is from a Federal district court, the appeal, of course, is to be lodged with the appropriate U.S. court of appeals and the Federal Rules and [sic] Appellate Procedure are to control. This article is not intended to make the Federal rules generally applicable to the extradition hearing itself, but only to the appeal of a decision under Article 3(a).

Treaty Report, *supra* note 50, at 8.

57. 132 Cong. Rec. S 9,148 (daily ed. July 16, 1986). Essentially, Article 3(b) partially overrules *In re Mackin*, 668 F.2d 122 (2d Cir. 1981), which not only was one of the cases that gave rise to the treaty but also reaffirmed the longstanding doctrine that the government cannot bring a direct appeal from an adverse ruling in an extradition proceeding. *See supra* notes 5, 24–26 and accompanying text (discussing the no-appeal rule).

58. 132 Cong. Rec. S 9,160 (daily ed. July 16, 1986).

59. *Id.* at S 9,159. Senator Hatch was one of ten senators who voted to refuse consent. *See id.* at S 9,273.

non-inquiry.[60] The Treaty's effort to create federal court appellate jurisdiction has received far less discussion.[61]

C. Judicial Interpretations of Article 3(b)

In three cases, federal courts have relied on Article 3(b) of the Supplemental Treaty to obtain subject matter jurisdiction over direct appeals in extradition cases. The First Circuit noted in *In re Howard*[62] that no statute granted it subject matter jurisdiction to review appeals from non-Article III extradition decisions, but the court ruled that the Supplementary Treaty expressly gives "United States courts" authority to hear appeals in cases involving the application of Article 3(a) of the Treaty.[63] With respect to the ability of a treaty to create federal court subject matter jurisdiction, the court declared that "the Supplementary Treaty . . . has the force of law, U.S. Const. art. VI, cl. 2."[64] In other words, the court, citing the Supremacy Clause, assumed that the appellate jurisdiction provision was self-executing.

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60. *See, e.g.*, BLAKESLEY, *supra* note 21, at 74–88; CHRISTOPHER H. PYLE, EXTRADITION, POLITICS, AND HUMAN RIGHTS 201–06 (2001); William M. Hannay, *An Analysis of the U.S.-U.K. Supplementary Extradition Treaty*, 21 INT'L LAWYER 925 (1987); Steven Lubet, *Extradition Unbound*, 24 TEX. INT'L L.J. 47 (1989); Quigley, *supra* note 22, at 432–33; Michael P. Scharf, *Foreign Courts on Trial: Why U.S. Courts Should Avoid Applying the Inquiry Provision of the Supplementary U.S.-U.K. Extradition Treaty*, 25 STAN. J. INT'L L. 257 (1988).

61. *See* Diane Marie Amann, *The U.S.-U.K. Supplementary Extradition Treaty and the Political Offense Exception*, 31 INT'L LAWYER 622, 624 n.97 (1997); Bassiouni, *Political Offense*, *supra* note 50, at 277, 279 (declaring the appeal procedure "introduces a novelty in U.S. extradition," an "ad hoc solution of dubious wisdom" that should have been accomplished across the board by statute rather than by treaty); Epps, *supra* note 12, at 300; Christie A. Leary, Note, *The Political Offense Exception, the Irish Republican Army, and the Supplementary Treaty*, 5 J. INT'L L. STUD. 293, 314 (1999); Michelle N. Lewis, Note, *The Political Offense Exception: Reconciling the Tension Between Human Rights and International Public Order*, 63 GEO. WASH. L. REV. 585, 593 (1995) (suggesting the appeal provision reflected the contemporaneous effort to reform the extradition statutes).

62. 996 F.2d 1320 (1st Cir. 1993). For a description of the facts and proceedings, see *supra* notes 1–3 and accompanying text.

63. *Id.* at 1325–26 (describing the treaty as allowing "appeals taken to courts cloaked with the judicial power of the United States"). The court also determined that the Supplementary Treaty allows an appeal from the magistrate to the district court, with a second appeal to the Court of Appeals. *See id.* at 1326–27; *see also* Epps, *supra* note 12, at 300 (discussing this issue). The district court did not pause over the jurisdictional issues, except to reject the government's argument that Article 3(b) gives an appeal only to the government, and relegates the fugitive to habeas review. *See In re* Howard, 791 F. Supp. 31, 33–34 (D. Mass. 1992).

64. *In re* Howard, 996 F.2d at 1326.

The second case, *In re Smyth*,[65] involved Great Britain's effort to obtain James Smyth, who had escaped from the Maze Prison where he was serving a sentence for the attempted murder of a prison officer in Northern Ireland. The government appealed the district court's denial of extradition under Article 3(a), and the Ninth Circuit reversed. Although the court spent a great deal of time attempting to determine the proper meaning of Article 3(a), it paid virtually no attention to the validity of Article 3(b). On the issue of jurisdiction, the court stated, "[w]e have jurisdiction because the Supplementary Treaty provides for a right of direct appeal from district court extradition decisions made pursuant to Article 3(a)."[66] The court ultimately reversed the district court's decision to deny extradition, and remanded for entry of an order allowing extradition.[67]

The *Smyth* court appeared to have believed that it was acting within its ordinary Article III capacity. The court repeatedly referred to the extradition proceedings before the district judge as proceedings before "the district court,"[68] suggesting that they were Article III proceedings. However, the court also stated that the district court was "conduct[ing]" the extradition proceeding "under the authority of a treaty enacted pursuant to Article II."[69] In his dissent, Judge John Noonan seized on this language to accuse the court of "act[ing] as though it was itself an Article II court."[70] Yet, Judge Noonan's analysis did not go any deeper into questions of jurisdiction. Instead, he relied on *Howard*, and declared that "[t]he language of the Treaty was intended to invoke the judicial power of the United States, that power possessed only by an Article III court."[71] Like the panel opinion, Judge Noonan

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65. *In re* Smyth, 61 F.3d 711 (9th Cir. 1995).

66. *Id.* at 713.

67. *See id.* at 722. Smyth was extradited to the United Kingdom but was subsequently freed pursuant to the 1998 Good Friday Agreement that established joint participation of Catholics and Protestants in the government of Northern Ireland. *See* Bob Egelko, *Irish Pleased by Extradite Ruling*, S.F. EXAMINER, Sept. 15, 2000, at A5.

68. *See, e.g.*, *In re* Smyth, 61 F.3d at 713.

69. *Id.* at 720–21.

70. *In re* Smyth, 72 F.3d 1433, 1434 (9th Cir. 1996) (Noonan, J, joined by Pregerson, Reinhardt, and O'Scannlain, JJ., dissenting from denial of rehearing en banc). This accusation supported Judge Noonan's arguments that the court ignored the Federal Rules of Civil Procedure and Evidence and adopted a scope of review that was too narrow.

71. *Id.* at 1434 ("Although the panel in our case was aware of *Howard* and actually cited it, it did not adopt its analysis. The panel acted as an Article II court reviewing the decision of an Article II court."). Contrary to Judge Noonan's assertion, I believe a fair

did not explore how a treaty could "invoke the judicial power of the United States" without the assistance of a statute.

The third case, *In re Artt*,[72] involved three more escapees from the Maze Prison.[73] The district court found that all three were extraditable under the Supplementary Treaty. They appealed to the Ninth Circuit, where they made a series of constitutional challenges to the extradition process established by federal statutes and the Supplementary Treaty. The court began its analysis by recognizing that Article 3(b) is a "clear departure from th[e] established rule" that extradition rulings are not appealable.[74] Nonetheless, the court declared, "Article 3(b) gives us jurisdiction over the appellants' appeal from the district judge's Article 3(a) findings."[75] The court then rejected a separation of powers challenge to the federal extradition statutes.[76]

The escapees also contended that the Supplementary Treaty required the court of appeals to hear the case as an Article III court, even though the Secretary of State could ultimately review the court's decision. As a result, they asserted, the "treaty language clearly subjects the decisions of an Article III court to Executive Branch review."[77] The court's analysis of this issue was rather coy:

> We are not persuaded by appellants' argument. *Even if we are acting as an Article III court* when we review the district judge's Article 3(a) findings on appeal, there is no indication that our decision is subject to Executive Branch "review" such that the doctrine of separation of power is violated.[78]

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reading of the opinion indicates that the court believed it was acting under Article III but also believed that different substantive and procedural rules apply in extradition cases.

72. 158 F.3d 462 (9th Cir. 1998), *withdrawn*, 183 F.3d 944 (9th Cir. 1999), *dismissed as moot*, 249 F.3d 831 (9th Cir. 2000).

73. Barry Artt was convicted of murdering a prison official; Pol Brennan was convicted of possessing explosives with intent to endanger life or injure property; and Terence Kirby was convicted of several crimes, including felony murder. *See In re* Artt, 158 F.3d at 464.

74. *Id.* at 467.

75. *Id.* at 468.

76. The escapees argued that 18 U.S.C. § 3184 unconstitutionally allows the executive branch to review the judgments of Article III courts. They also claimed that if judges hear extradition cases outside Article III, they have been unconstitutionally conscripted to act as adjuncts to the executive branch. The court rejected both challenges. *See In re* Artt, 158 F.3d at 469–70. For discussion of these issues, see Parry, *supra* note 14, at 165–69.

77. *In re* Artt, 158 F.3d at 469.

78. *Id.* (emphasis added).

The court explained that it was relying on the reasoning of the Seventh Circuit in *DeSilva v. DiLeonardi*, which had also rejected a constitutional challenge to the extradition statute.[79] *DeSilva* held the Secretary of State's discretion to refrain from extradition is not the same as executive review, because a judge's certification of extraditability "authorizes, but does not compel, the executive branch to act in a certain way."[80]

In short, the court in *In re Artt* asserted subject matter jurisdiction by first concluding that the Supplementary Treaty is sufficient to grant jurisdiction, and second, by rejecting the dominant view that the Secretary of State's ultimate control over extradition, which most courts equated with executive review, removed extradition proceedings from Article III. Nonetheless, the court was unable to say clearly whether it was in fact acting under Article III.[81] Moreover, even if the courts in *In re Artt* and *DeSilva* were correct, the settled understanding remains that no statute provides appellate jurisdiction in extradition cases.[82] Thus, the primary problem created by the Supplementary Treaty—its attempt to create federal court jurisdiction in the absence of a statute—persists whether or not the initial proceeding is within Article III.[83]

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79. *See id.* at 469.

80. DeSilva v. DiLeonardi, 125 F.3d 1110, 1113 (7th Cir. 1997), quoted in *Artt*, 158 F.3d at 469. Most courts follow the Second Circuit's rulings that extradition is an Article I proceeding, with the result that executive review of the decision raises no Article III concerns. *See supra* notes 30–38 and accompanying text. Indeed, an earlier Ninth Circuit case had already rejected a similar constitutional challenge to the extradition statute by relying on Second Circuit case law. *See* Lopez-Smith v. Hood, 121 F.3d 1322, 1327 (9th Cir. 1997) (citing LoDuca v. United States, 93 F.3d 1100 (2d Cir. 1996)).

81. The court reversed the district court's decision approving extradition, but later withdrew its opinion and granted rehearing on issues relating to the Supplemental Treaty's political offense provisions and Article 3(a)'s relaxation of the non-inquiry rule. *In re* Artt, 183 F.3d at 944. Nearly a year after argument on rehearing, the court asked the Justice Department whether, in light of the Good Friday Agreement and the accompanying release of political prisoners, the British government still sought the extraditions. *See* Egelko, *supra* note 67. Two weeks later, Britain dropped efforts to obtain the extradition of several fugitives, including Artt, Brennan, and Kirby. *See* Bob Egelko, *Britain Drops Extradition Bid*, S.F. Examiner, Sept. 30, 2000, at A3. The court subsequently dismissed the appeal. *See In re* Artt, 249 F.3d 831 (9th Cir. 2000).

82. *See supra* note 40 and accompanying text.

83. In fact, the Supplementary Treaty may exacerbate the Article III issues surrounding extradition. Under the dominant view, the presence of executive review means that extradition is an Article I proceeding, and the judges who hear extradition cases do not sit as federal courts. Because the proceeding is not within Article III, the general appellate jurisdiction statute (28 U.S.C.§ 1291), which applies only to the final judgments of courts,

In sum, judicial responses to the Supplementary Treaty have not clarified the jurisdictional issues that it raises. Lawyers representing fugitives from Great Britain may be able to raise creative Article 3(a) questions whenever there is a possibility of obtaining a direct appeal. Existing case law will provide little guidance, however, to courts concerned about their jurisdiction over such cases.

III. CONGRESSIONAL CONTROL OF FEDERAL COURT JURISDICTION

A. The Basic Doctrine

The Constitution specifically grants Congress the power to establish lower federal courts and to make exceptions to the Supreme Court's appellate jurisdiction; it also lists the categories of federal subject matter jurisdiction.[84] Some scholars, most notably Akhil Amar, argue that Congress must vest the federal courts as a whole with all of "the judicial power," or at least the category of judicial power that includes federal question cases.[85] Federal statutes and Supreme Court case law, however, have never adopted that view.

Although one could interpret Article III as a self-executing grant of jurisdiction to the Supreme Court and all other federal courts created by Congress, that interpretation has never made significant headway. The Supreme Court views its original

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does not apply to the result of that proceeding. *See supra* notes 35–38 and accompanying text. Under the treaty, however, the extradition proceeding apparently can be appealed to an Article III court, *followed by executive review*. Thus, the treaty creates one of two constitutional difficulties: either it commands federal courts to act in a non-Article III capacity—that is, as entities subject to executive revision—or it attempts to expand Article III to include the power to decide cases without finality or conclusiveness. Either way, and in addition to its effort to circumvent congressional control of federal court jurisdiction, the Supplementary Treaty's grant of subject matter jurisdiction is invalid unless the dominant view of extradition is incorrect or a treaty can change the meaning of Article III (or unless the treaty silently prohibits executive review in Article 3(a) cases).

84. U.S. CONST. art. III, §§ 1, 2.

85. *See, e.g.*, Akhil Reed Amar, *A Neo-Federalist View of Article III*, 65 B.U. L. REV. 205, 206 (1985) [hereinafter Amar, *Neo-Federalist*] ("the Framers did not intend to require the creation of lower federal courts; but . . . they did require that some federal court – supreme or inferior – be open, at trial or on appeal, to hear and resolve finally any given federal question, admiralty, or public ambassador case"); Akhil Reed Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499 (1990) [hereinafter Amar, *Two-Tiered*]. For a summary of the congressional control debate, *see* RICHARD H. FALLON, ET AL., HART AND WESCHLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 348–65, 370–73 (4th ed. 1996 & Supp.).

jurisdiction as self-executing but not exclusive.[86] Moreover, the Court recognizes that Congress has control over its appellate jurisdiction.[87] The Court has consistently refused to treat lower federal court jurisdiction as self-executing.[88] Indeed, Amar claims that Article III is only self-executing for the Supreme Court:

> If Congress were ever to enact a jurisdictional regime that opened an impermissible gap in mandatory federal jurisdiction, the proper "filling" of that gap would be to resurrect the appellate jurisdiction of the Supreme Court, rather than extending the jurisdiction of inferior federal courts.[89]

Even under Amar's framework, lower federal courts may not rely directly on Article III for their subject matter jurisdiction; congressional action is also necessary.

Congress has also refused to treat Article III as self-executing or to vest the federal courts with all of "the judicial power."[90] For example, Congress did not give general federal question jurisdiction to the district courts until 1875.[91] In addition, although Section 25 of the Judiciary Act gave the Supreme Court

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86. *See* FALLON, ET AL., *supra* note 85, at 294–97 (collecting cases and discussing Congress's regulation of the Supreme Court's original jurisdiction).

87. *See* Durousseau v. United States, 10 U.S. (6 Cranch) 307, 314 (1810) (stating congressional grants of less than complete jurisdiction to the Supreme Court should be read as implied exceptions to the jurisdiction given by Article III). The Court has placed some constitutional limits on congressional power over federal court jurisdiction. *See* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995); United States v. Klein, 80 U.S. (13 Wall.) 128 (1871); *see also infra* note 94 (noting the Court's interpretation of jurisdictional statutes to avoid constitutional issues). Despite those limits, Congress retains primary control; thus, this Article does not address their scope or propriety. For a discussion and collection of authorities, see FALLON, ET AL., *supra* note 85, at 365–79.

88. *See, e.g.*, Merrell Dow Pharmaceuticals v. Thompson, 478 U.S. 804, 807 (1986) (stating the grant of "arising under" jurisdiction "is not self-executing"); Sheldon v. Sill, 49 U.S. (8 How.) 441, 449 (1850).

89. Amar, *Neo-Federalist*, *supra* note 85, at 257 n.168.

90. As Amar admits, the Judiciary Act "purports to confer jurisdiction" on the Supreme Court despite what he claims is the self-executing nature of Article III. *See* Amar, *Neo-Federalist*, *supra* note 85, at 264 n.194; *see also* Amar, *Two-Tiered*, *supra* note 85, at 1538–39 (making a similar observation). *Compare* Durousseau v. United States, 10 U.S. (6 Cranch) 307, 314 (1810) (stating statutory grants of less than complete Supreme Court jurisdiction should be read as implied exceptions to the jurisdiction given by Article III).

91. *See* Act of Mar. 3, 1875, ch. 137, 18 Stat. 470. Even then, Congress included an amount in controversy requirement that remained until 1980. *See* Federal Question Jurisdictional Amendments Act of 1980, Pub. L. 96-486 § 2(a), 94 Stat. 2369. Congress has never given the federal courts all of the diversity jurisdiction authorized by Article III. *See* Judiciary Acts, 1 Stat. 73, 78 (1789) (setting $500 amount in controversy requirement for diversity cases).

jurisdiction over state court decisions that denied federal claims of right, including treaty rights, the Act did not give the Court the right to review state decisions that upheld federal rights.[92] Several Supreme Court statements and holdings also support the idea of near-plenary congressional control.[93]

At times, however, the Supreme Court has narrowly interpreted some restrictions on federal court jurisdiction, particularly Congress's attempts to interfere with jurisdiction over constitutional claims.[94] The Court has also exercised control over federal jurisdiction by refusing to allow lower federal courts to exercise all of the jurisdiction granted by Congress. Again, the clearest example is federal question jurisdiction. The Supreme Court has held that statutory federal question jurisdiction is narrower than constitutional federal question jurisdiction, even though Congress may have intended to grant the full extent of that jurisdiction to the federal courts.[95] Justiciability doctrines, which also restrict federal court subject matter jurisdiction, provide another example. The Court presents some justiciability limits as derived from Article III, but it has crafted a set of prudential limits that prevent federal courts from hearing cases that are within Article III and the statutory grant.[96] Finally, abstention doctrines also prevent federal courts from hearing cases within the statutory grant.[97]

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92. *See* Judiciary Acts, 1 Stat. 73, 85 (1789). Amar suggests losing litigants whose opponents' federal claims were upheld could usually claim that their own federal rights were denied. *See* Amar, *Two-Tiered*, *supra* note 85, at 1529–33. *But see* Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. PA. L. REV. 1569, 1585–93 (1990) (arguing Amar's claim does not fit with Supreme Court practice).

93. *See, e.g.*, *Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1869); *supra* note 88.

94. *See, e.g.*, I.N.S. v. St. Cyr, 533 U.S. 289 (2001); Felker v. Turpin, 518 U.S. 651 (1996); Barry Friedman, *A Different Dialogue: The Supreme Court, Congress, and Federal Jurisdiction*, 85 NW. U. L. REV. 1, 57 & n.263 (1990); *see also supra* note 87 (noting the debate over constitutional limits on congressional power over federal court jurisdiction).

95. *See* Franchise Tax Bd. v. Laborers Vacation Trust, 463 U.S. 1, 8 n.8 (1983). An analogous limit applies to diversity jurisdiction as well: the Court's rule of complete diversity is more restrictive than Article III's requirement of minimal diversity and is not compelled by the text of the diversity statute. *See* Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806).

96. *See* Allen v. Wright, 468 U.S. 737, 750–51 (1984) (discussing constitutional and prudential limits on standing); Goldwater v. Carter, 444 U.S. 996, 998 (1979) (Powell, J., concurring) (suggesting political question analysis has a prudential component).

97. *See* Friedman, *supra* note 94, at 18–20. *See generally* FALLON, ET AL., *supra* note 85, at 1222–1336 (discussing judicially-developed limitations on federal court jurisdiction).

In short, Congress attempts to control the scope of federal court subject matter jurisdiction, but the Supreme Court sometimes resists those efforts. As Barry Friedman suggests, "the contours of federal jurisdiction are resolved as the result of an interactive process between Congress and the Court on the appropriate uses and bounds of the federal judicial power."[98] Regardless of the exact allocation of power between the court and Congress, however,[99] Congress has the primary role, in part because the "interactive process" that Friedman describes takes place in the context of statutory interpretation and congressional power under Article III.

The introduction to this Article quotes the Supreme Court's statement in *Kokkonen v. Guardian Life Ins. Co.* that federal courts "possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree."[100] The Court's statement is literally true. Congress passes jurisdictional statutes, and the Court interprets them. Out of that interaction, and not simply from any "judicial decree," comes the definition of federal court subject matter jurisdiction. The Court's concern in *Kokkonen*, however, was with the relationship between the courts and Congress. The Supplementary Treaty raises the possibility that the Court's statement is incomplete. Federal courts cannot expand their jurisdiction by decree alone, but the question remains whether they can exercise "power authorized by Constitution and [treaty]" in addition to power "authorized by Constitution and statute."[101]

The weight of current doctrine suggests that a treaty cannot grant federal courts subject matter jurisdiction. The constitutional convention's "Madisonian Compromise" left to Congress the task of creating lower federal courts and providing for their jurisdiction.[102] Allowing a treaty to accomplish part of this task would upset that process. In other words, if Congress's role in

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98. Friedman, *supra* note 94, at 2–3.

99. *See generally* Mark V. Tushnet, *The Law, Politics, and Theory of Federal Courts: A Comment*, 85 NW. U. L. REV. 454 (1991) (arguing the dialogue theory overstates the Court's role); Michael Wells, *Congress's Paramount Role in Setting the Scope of Federal Jurisdiction*, 85 NW. U. L. REV. 465 (1991) (making a similar argument).

100. 511 U.S. 375, 377 (1994) (citations omitted).

101. *Id.*

102. *See* U.S. CONST. art. III, §§ 1–2; FALLON, ET AL., *supra* note 85, at 7–9. Even if this task was in part mandatory, as Amar suggests, congressional action remained necessary. *See supra* notes 86–89 and accompanying text.

defining jurisdiction is an important part of the Madisonian Compromise—as opposed to an interpretation of the Compromise that stresses the goal of delay or that insists the only issue was the creation of lower federal courts—then treaties are no substitute for a jurisdictional statute.

The Supreme Court appears to have adopted a flexible or functional approach to separation of powers questions related to non-Article III courts.[103] But these cases test the validity of congressional actions. The separation of powers issue raised by the Supplementary Treaty is the validity of a process that bypasses bicameralism and creates jurisdiction with a two-thirds Senate vote and subsequent ratification by the President. This crucial distinction could generate a more formal analysis that would dovetail with the Court's more general statements about congressional control.

Finally, and most abstractly, the debate among the Supreme Court, Congress, and commentators centers on the respective power of the legislature and the judiciary to create and manage federal court jurisdiction. The terms of this debate, and thus the terms within which participants are used to thinking about these issues, provide little room for novel methods of regulating jurisdiction, such as treaties.

At the same time, however, treaties and other international agreements have had an undeniable impact on federal court jurisdiction. The more significant issue is whether that impact can save the Supplementary Treaty or force a different understanding of the congressional control doctrine.

B. Treaties and Federal Court Subject Matter Jurisdiction

Treaties and other international agreements play a significant role in setting the boundaries of federal court jurisdiction in at least two areas: foreign trade and claims instituted by U.S. citizens against other countries.

In the trade context, the Free Trade Agreement between the United States and Canada, and the North American Free Trade Agreement between the United States, Canada, and Mexico provide that countervailing duty and anti-dumping claims may be

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103. *See* CFTC v. Schor, 478 U.S. 833, 851 (1986); Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 586–87 (1985).

heard by bi-national panels of experts.[104] Ordinarily, these disputes are heard by the Court of International Trade, an Article III court, with further review available in the Federal Circuit and the Supreme Court.[105] In implementing the free trade agreements, however, Congress precluded federal court review for cases within the agreements if a party to the proceeding invokes the right to a bi-national panel review.[106] In other words, the agreements and their implementing legislation have limited federal court subject matter jurisdiction by entrusting the merits of certain trade cases, including the final interpretation and application of substantive federal law, to non-judicial panels.[107]

The other prominent example is the use of treaties or agreements to settle claims made against foreign countries.[108] At least in theory, a U.S. citizen or resident with a claim against another country could file suit in federal court.[109] In practice, however, a variety of obstacles such as sovereign immunity,[110] the act of state doctrine,[111] and uncertain prospects for enforcing a judgment are likely to prevent successful litigation.

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104. *See* Barbara Bucholtz, *Sawing off the Third Branch: Precluding Judicial Review of Anti-Dumping and Countervailing Duty Assessments under Free Trade Agreements*, 19 MD. J. INT'L L. & TRADE 175, 188–94 (1995) (describing relevant provisions of both agreements).

105. *See id.* at 183–85 (describing the administrative and judicial process for such cases).

106. *See* Tariff Act of 1930, 19 U.S.C. § 1516(a)(g)(4) (2000). The agreements conceded the possibility of federal court challenges to the constitutionality of the panels, and the implementing legislation codifies this exception. *See* Bucholtz, *supra* note 104, at 190, 192–93.

107. *See generally* Bucholtz, *supra* note 104, at 194–96, 199; 19 U.S.C § 1516a(g)(4) (noting disputes over the constitutionality of the bi-national process remain in federal court). Removal of federal court jurisdiction over the merits of trade disputes has generated debate over the constitutionality of these provisions. *See, e.g.*, Matthew Burton, Note, *Assigning the Judicial Power to International Tribunals*, 88 VA. L. REV. 1529 (2002) (arguing bi-national review satisfies a flexible interpretation of Article III).

108. *See* HENKIN, *supra* note 13, at 299–303 (describing the common practice of settling claims by agreements or treaties); *see also* Dames & Moore v. Regan, 453 U.S. 654, 679 (1981).

109. *See Dames & Moore*, 453 U.S. at 663–67 (describing lower court proceedings). Article III authorizes federal courts to hear such suits under federal question jurisdiction, if applicable, or diversity jurisdiction "between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." U.S. CONST. art. III, § 2, cl.1.

110. *See* 28 U.S.C. § 1604 (2000) ("[A] foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided . . . .").

111. *See* W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., Int'l, 493 U.S. 400, 409 (1990) ("The act of state doctrine . . . requires that, in the process of deciding [cases], the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid.").

For example, the Foreign Sovereign Immunities Act not only codifies the doctrine of foreign sovereign immunity but also provides the sole statutory basis for federal court subject matter jurisdiction over disputes between U.S. residents and other countries.[112] The Act also complements the International Claims Settlement Act, which recognizes executive power to settle claims and creates largely non-judicial mechanisms to enhance settlements.[113] Together, these statutes reflect Congress's judgment that many claims against foreign states are best resolved diplomatically and administratively, with the result that such claims should usually be beyond the reach of federal court jurisdiction, even though they fall within the scope of Article III.

Finally, no discussion of claims settlement is complete without recognizing the Supreme Court's ruling in *Dames & Moore v. Regan*, which held that the President's authority to settle claims is broad enough to include the power to terminate claims pending in federal court.[114] The Court insisted that the settlements at issue did not alter federal court jurisdiction because they "simply effected a change in the substantive law governing the lawsuit."[115] The consequence of that "change in law," however, was the removal to the Iran-U.S. Claims Tribunal of a class of cases that were pending or could have been brought in federal court.

The claims and trade limitations on federal court jurisdiction raise some separation of powers concerns. Yet these limitations have significant historical pedigrees. They also implicate foreign policy interests and individual rights, and have a history of generating international tensions that require political resolution. The political branches and the courts could well agree on the need for caution in such areas. Certainly, the executive branch and, to some extent, Congress, want to avoid too much judicial interference in foreign policy issues, while the courts might have cause to worry that cases in these areas would infringe upon their ability to make and enforce final decisions.

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112. *See* 28 U.S.C. § 1330(a) (2000).

113. *See* 22 U.S.C. §§ 1621–1622(g) (2002) (creating, among other things, the Foreign Claims Settlement Commission). The Commission's decisions are final. *See* 22 U.S.C. § 1622 (g).

114. *See* Dames & Moore v. Regan, 453 U.S. 654, 675–88 (holding longstanding practice accompanied by congressional acquiescence established Congress's consent to suspension and termination of claims by executive agreement).

115. *Id.* at 684–85.

These policy arguments, however, obscure a more crucial point. Changes in the scope of federal court jurisdiction in the context of international trade and claims settlement are the product of statutes as well as treaties.[116] Thus, they ultimately provide little support for attempts to restrict or expand federal court jurisdiction by treaty alone.[117] The claims and trade examples do not change the presumption that federal courts can hear cases arising under treaties only when federal statutes vest the courts with jurisdiction over such cases.

Return now to extradition proceedings, which usually arise under treaties. With the exception of the Supplementary Treaty, these treaties do not create federal court jurisdiction. Instead, Congress created a jurisdictional and procedural statute for extraditions that has been interpreted to preclude appeals and requires the Secretary of State to review the submission. Perhaps a judge could hear a non-Article III extradition proceeding pursuant to a treaty without specific statutory authorization. In fact, this issue vexed the federal courts in the early nineteenth century and led to passage of the international extradition statute in 1848.[118] The Supplementary Treaty however, goes farther. By vesting the federal courts with appellate jurisdiction over certain issues, the Supplementary Treaty directly challenges congressional control of federal court jurisdiction.[119]

IV. SELF-EXECUTING EXTRADITION TREATIES

The doctrine of congressional control is not the typical framework for assessing the domestic legal effect of a treaty. The ordinary approach is simply to ask if the treaty is self-executing. If the Supplementary Treaty's appellate jurisdiction provisions are self-executing, then the fact that those provisions trample on

116. Again, *Dames & Moore* insisted the President's authority to suspend and terminate claims in federal court had nothing to do with jurisdiction and derived from implied congressional consent, not from inherent executive authority. *See id.* at 684–88.

117. *Cf.* Breard v. Greene, 523 U.S. 371, 377–78 (1998) (suggesting treaties cannot give federal courts jurisdiction over claims barred by the Eleventh Amendment). Related to the restriction of jurisdiction is the use of a treaty to limit the ability of law enforcement officials to enforce federal law. Thus, in *Cook v. United States*, 288 U.S. 102 (1933), the Court held that a treaty with Great Britain superseded portions of a federal statute and narrowed the statutory authority of the Coast Guard to search British flag vessels outside U.S. territorial waters.

118. *See infra* notes 143–80 and accompanying text.

119. *See* Supplementary Treaty, *supra* note 6, at 8.

congressional control of federal court jurisdiction has little relevance. After all, the point of self-execution is to bypass Congress by using the treaty power to make law.

A. The Basic Issue

The contemporary self-execution debate centers on when a court should enforce a treaty as law.[120] Some commentators argue that treaties are almost always self-executing, so that they become judicially enforceable upon ratification without the need for any additional action by Congress.[121] Others argue that treaties are almost never self-executing, so that they function as judicially enforceable law only when Congress takes additional steps to implement the treaties.[122] The stakes are significant, because a self-executing treaty overrides inconsistent state legislation pursuant to the Supremacy Clause[123] and trumps prior inconsistent federal legislation under the "last in time" rule.[124]

Faced with the fact that some treaties are self-executing and some are not, most commentators now recognize that they cannot resolve the issue with an all-or-nothing answer. The debate now turns on whether there is a presumption in favor of self-execution, with a rough consensus of scholars claiming there should be such a presumption.[125] The arguments for or against a presumption present a complex mix of text, history, precedent, federalism, separation of powers arguments, and policy issues.

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120. *See* Carlos M. Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695 (1995). Determining whether a treaty provision is self-executing is not the same as determining whether the United States is obligated under the treaty. *See* HENKIN, *supra* note 13, at 203–04 (noting the United States is bound by treaty obligations whether or not they are self-executing).

121. *See* JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 64 (1996) ("The constitutionally preferable view is that no treaty is inherently non-self-executing except those which would seek to declare war on behalf of the United States. . . . [I]t also seems clear that all treaties are self-executing except those (or the portions of them) which, by their terms considered in context, require domestic implementing legislation or seek to declare war on behalf of the United States.").

122. *See* John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955, 1962, 2092–93 (1999) [hereinafter Yoo, *Globalism*]; John C. Yoo, *Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution*, 99 COLUM. L. REV. 2218, 2220, 2254 (1999).

123. *See* U.S. CONST. art. VI, cl. 2; Yoo, *Globalism*, *supra* note 122, at 1958.

124. *See* Vázquez, *Four Doctrines*, *supra* note 120, at 696.

125. *See* Yoo, *Globalism*, *supra* note 122, at 1959 ("[A] developing academic consensus has emerged that sharply criticizes non-self-execution.").

My view is that courts should apply a mild presumption in favor of self-execution, to place the burden on those who seek to prevent judicial enforcement of the Treaty.[126] Even those who favor a stronger presumption in favor of self-execution, however, do not claim that a self-executing treaty can displace Congress on *any* topic of legislation.[127] In fact, the most important development in the debate over self-execution has been an effort to analyze the specific circumstances where a treaty is, or is not, self-executing instead of relying solely on blanket arguments about the domestic legal status of treaties.[128] This more careful analysis specifically includes separation of powers concerns that may require congressional action in particular contexts. Thus, as Carlos Vázquez, argues, one basis for denying self-execution is when "the treaty purports to accomplish what under our Constitution may be accomplished only by statute."[129]

The test for determining which congressional powers are exclusive and which powers also fall within the scope of the treaty power is elusive. Vázquez suggests that certain subjects of legislation may be beyond the treaty power, such as defining criminal conduct, raising revenue, or making appropriations.[130] The power to define federal court jurisdiction may also belong in this category, at least presumptively.[131] The Constitution separates

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126. This is not the place for a full elaboration of my views on self-execution. Suffice it to say that text, original meaning, and precedent all support a presumption of self-execution in some contexts, but changes in the nature of treaties, federalism and separation of powers concerns, and problems with remedies provide arguments for overcoming the presumption in specific cases. I plan to discuss these issues in future articles. *See supra* note *. The discussion in Part IV draws on these ongoing projects.

127. *See* HENKIN, *supra* note 13, at 203 (suggesting treaties cannot intrude on congressional power to declare war, appropriate funds, or enact criminal law); PAUST, *supra* note 121, at 59–62 (conceding a treaty cannot displace Congress's power to declare war and admitting appropriations may be in the same category, while also arguing in favor of concurrent power over appropriations).

128. *See, e.g.*, Vázquez, *supra* note 120, at 696–97.

129. *Id.* at 697.

130. *See id.* at 718–19; *see also supra* note 127. In this context, Vázquez also notes the split of authority on whether extradition treaties are self-executing.

131. Vázquez appears to see the management of federal court jurisdiction as a topic separate from the issue of self-execution. *See Vazquez, supra* note 120, at 699 n.20. Of course, the distinction Vázquez draws between enforceability and jurisdiction also reflects careful federal courts thinking as well as the simple fact that 28 U.S.C. § 1331 has mooted the jurisdiction issue in most cases involving treaties. In any event, my goal is to describe how the Supplementary Treaty fails under current doctrine. I am not claiming that current doctrine is optimal or that treaties should never be able to create or restrict federal court jurisdiction.

Congress's power over federal courts from other legislative powers, and in that context, expressly refers to "Congress" instead of merely to "laws."[132] Settled doctrine assumes Congress has primary control over federal jurisdiction, subject only to judicial interpretation.[133] Structural and policy concerns suggest that the basic organization and responsibilities of the branches of the federal government should derive from legislation and not directly from negotiations with other countries.

The careful approach to self-execution has implications for general assumptions about extradition treaties and the specific jurisdictional issues raised by the Supplementary Treaty. The standard view is that extradition treaties are self-executing.[134] Courts and commentators repeat this common understanding again and again, often accompanied by citations to the Supreme Court's decisions in *Terlinden v. Ames*[135] or, less frequently, *United States v. Rauscher*[136] and *Valentine v. United States ex rel. Neidecker.*[137] Yet, the question of whether an extradition treaty should be self-executing is far more complicated.[138]

The federal extradition statute has been on the books since 1848 to provide a forum and procedure for extradition hearings.[139] Thus, none of these cases needed to—and none even purported to—address whether self-execution extends to creating federal court jurisdiction.[140] Moreover, the Supreme Court's cases do not support a blanket claim of self-execution across the board, and certainly not for the creation of jurisdiction. *Terlinden*, for example, suggests that extradition treaties are self-executing for the executive branch but not for the courts,[141] while *Rauscher* and

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132. *Compare* PAUST, *supra* note 121, at 62 (relying on the Constitution's statement that appropriations must be "made by Law" to argue that treaties, as laws, may do so).

133. *See supra* notes 84–103 and accompanying text.

134. *See* WHITEMAN, *supra* note 10, at 734.

135. 184 U.S. 270, 288 (1902). Many courts and commentators cite Bassiouni's extradition treatise, which in turn cites *Terlinden*. *See* BASSIOUNI, *supra* note 16, at 72 & n.172.

136. 119 U.S. 407 (1886).

137. 299 U.S. 5 (1936).

138. As Vázquez observes, "it has ... been said that extradition treaties are by their nature self-executing and, inconsistently, that they are non-self-executing." Vázquez, *supra* note 120, at 719.

139. *See* Act of Aug. 12, 1848, 9 Stat. 302.

140. *See* Vázquez, *supra* note 120, at 699 n.20 (recognizing no treaty can be self-executing in the lower federal courts without a jurisdictional statute).

141. The Court said that "[t]reaties of extradition are executory in their character," with the result that "'the treaty addresses itself to the political, not the judicial depart-

Valentine simply looked to extradition treaties for substantive rules.[142]

In short, self-execution doctrine may not encompass the power to create federal court jurisdiction. Moreover, the general claim that extradition treaties are self-executing, even if true, has nothing to do with the power to create jurisdiction. As the next section will demonstrate, early extradition litigation seems to confirm that self-execution has not traditionally included the power to create jurisdiction.

B. Extradition and the History of Self-Execution

The 1794 Jay Treaty between the United States and Great Britain required, among other things, extradition of murderers and forgers.[143] Because Congress never passed legislation to implement

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ment.'" Terlinden v. Ames, 184 U.S. 270, 288 (1902) (quoting Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829)); *see* David L. Sloss, *Non-Self-Executing Treaties: Exposing a Constitutional Fallacy*, 36 U.C. DAVIS L. REV. 1, 19–21 (2002) (explaining the term "executory" equates with finding that a treaty is not self-executing as a source of law for courts). Thus, *Terlinden* appears to hold that extradition treaties are *not* self-executing. *See* Bradley & Goldsmith, *supra* note 44, at 447; Vázquez, *supra* note 120, at 719. But *Terlinden* may also have equated executory treaty provisions with the exercise of executive power. The Court declared,

> The power to surrender [in extradition] is clearly included within the treaty-making power and the corresponding power of appointing and receiving ambassadors and other public ministers. Its exercise pertains to public policy and governmental administration, is devolved on the Executive authority, and the warrant of surrender is issued by the Secretary of State as the representative of the President in foreign affairs.

184 U.S. at 289. The Court also stated, "The decisions of the Executive Department in matters of extradition, within its own sphere, and in accordance with the Constitution, are not open to judicial revision." *Id.* at 290. This language suggests the President can obtain the authority to execute a warrant of surrender directly under a treaty. In other words, *Terlinden* may hold that an executory treaty provision can be self-executing as a grant of power to the executive branch, even if it is not self-executing for the courts.

142. *Rauscher* stated a treaty is self-executing "whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And, when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it." United States v. Rauscher, 119 U.S. 407, 419 (1886). In *Valentine*, the Court consulted the substantive provisions of an extradition treaty and ruled they did not grant a power to extradite citizens. *See* Valentine v. United States *ex rel.* Neidecker, 299 U.S. 5, 10–18 (1936).

143. Treaty of Amity, Commerce and Navigation between His Britannic Majesty and the United States of America, Nov. 19, 1794, U.S.-Gr. Brit., art. 27, 8 Stat. 116, 129. Beginning in 1788, the United States entered into a series of agreements—analogous to extradition—for the return of deserting sailors to their home countries. In contrast to its treatment of extradition, Congress consistently passed legislation to implement these agreements. *See* Parry, *supra* note 14, at 105, 114 n.111, 120 n.143.

this part of the treaty, the extradition process remained unclear when Thomas Nash, alias Jonathan Robbins, was arrested in 1799 in Charleston, South Carolina on the charge that he committed murder on the British ship *Hermione*.[144]

Although British authorities wanted custody of Robbins, District Court Judge Bee was reluctant to deliver him without a request from the administration.[145] Secretary of State Pickering suggested that Judge Bee "should be directed to deliver up the offender in question, on the demand of the British government, by its Minister."[146] A less certain President Adams stated, "How far the president of the U.S. would be justifiable in directing the judge, to deliver up the offender, is not clear. I have no objection to advise and request him to do it."[147] Pickering promptly informed Judge Bee of the President's "advice and request."[148]

In the subsequent court proceedings, Robbins challenged the court's jurisdiction and made several other arguments against extradition, all of which Judge Bee rejected.[149] On the issue of jurisdiction, Judge Bee declared:

> When application was first made, I thought this a matter for the executive interference, because the act of congress respecting fugitives from justice, from one state to another, refers it altogether to the executive of the states; but as the law and the treaty are silent upon the subject, recurrence must be had to the general powers vested in the judiciary by law and the constitution, the 3d article of which declares the judicial power shall extend to treaties, by express words.... If it were otherwise, there would be a failure of justice.[150]

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144. *See* Ruth Wedgwood, *The Revolutionary Martyrdom of Jonathan Robbins*, 100 YALE L.J. 229, 237, 286–87 (1990); *see also* Parry, *supra* note 14, at 108–14 (discussing the Robbins extradition). The convention among commentators is to use "Robbins" to refer to Thomas Nash/Jonathan Robbins, despite the fact that his name is spelled "Robins" in the case caption from the district court. *See infra* note 149.

145. *See* Wedgwood, *supra* note 144, at 288.

146. Letter from Timothy Pickering to John Adams (May 15, 1799), in ADAMS PAPERS, roll 394, at 219–219a (Mass. Hist. Soc. Microfilm ed.).

147. Letter from John Adams to the Secretary of State (May 21, 1799), in ADAMS PAPERS, roll 119, #46 (Mass. Hist. Soc. Microfilm ed.).

148. Letter from Timothy Pickering to Thomas Bee (June 3, 1799), in PICKERING PAPERS, roll 11, at 209 (F. Allis ed. Mass. Hist. Soc. Microfilm ed. 1966).

149. United States v. Robins, 27 F. Cas. 825 (C.C.D.S.C. 1799) (No. 16,175).

150. *Id.* at 833.

In other words, Judge Bee treated the Robbins extradition as a federal question case and found jurisdiction directly under Article III and the treaty.[151]

With no statute to implement the treaty or provide federal question jurisdiction, Judge Bee's ruling meant either that Article III was self-executing for lower federal courts under some circumstances—which is the natural reading of his holding—or that the treaty was self-executing as a grant of jurisdiction. The case generated a political firestorm after British authorities quickly tried, convicted, and executed Robbins.[152] Controversy centered on Robbins' claim that he was a citizen and the perception that President Adams had ordered Judge Bee to turn Robbins over to a once and future enemy. Judge Bee's assertion of jurisdiction also received criticism, however.

Senator Charles Pinckney complained that the court improperly exercised jurisdiction beyond the statutory grant.[153] Representative Albert Gallatin argued that the treaty was not self-executing and that Judge Bee's assertion of jurisdiction was improper without a statutory grant.[154] More generally, opponents of the administration contended that congressional power would weaken and executive power would increase if the executive could refer treaty issues to the federal courts in the absence of a jurisdictional statute. They also suggested that self-execution and an expansive treaty power could lead to restrictions on individual liberty.[155]

Congressman John Marshall defended the President with a celebrated speech that included the famous claim that the President is "the sole organ of the nation in its external relations."[156] Marshall sought to neutralize Judge Bee's questionable jurisdictional ruling by restating it as a doctrine that, because the judicial power extends to treaties, judges may

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151. For discussions of Judge Bee's options for asserting jurisdiction, see Parry, *supra* note 14, at 110–11, and Wedgwood, *supra* note 144, at 291–92.

152. *See* Robins, 27 F. Cas. at 833; Wedgwood, *supra* note 144, at 304–08.

153. *See* CHARLES PINCKNEY, THREE LETTERS, WRITTEN AND ORIGINALLY PUBLISHED, UNDER THE SIGNATURE OF A SOUTH CAROLINA PLANTER 3, 12–13, 19–20 (Philadelphia: Aurora 1799); *see also* Wedgwood, *supra* note 144, at 331–32 (discussing Pinckney's arguments).

154. *See* Wedgwood, *supra* note 144, at 336–37.

155. *Id.* at 315–16, 321.

156. 10 ANNALS OF CONG. 613 (1800) (Statement of Rep. Marshall) [hereinafter Marshall].

"perhaps . . . be called in" to help implement them even without legislation.[157] More generally, Marshall defended a strong version of self-execution. Treaties bind the nation and are the supreme law of the land, and the President must execute them if they are sufficiently clear, whether or not Congress passes implementing legislation.[158] Self-executing treaties, in other words, could empower the executive as well as the judiciary. Indeed, the role of courts in executing treaties would in some instances be limited to assisting the President when he chose to seek such assistance.[159]

Marshall's argument, however, did not sweep away the opposition,[160] and his opponents continued to seek legislation to regulate extradition.[161] The Robbins affair became an important and recurring issue during the election of 1800, in which Adams was decisively defeated and high Federalist executive power claims were rejected.[162] Indeed, after *Robins*, the United States did not extradite anyone for more than forty years. Thus, while later cases would exhume Marshall's speech to support executive foreign affairs authority,[163] those views, particularly Marshall's early views on self-execution, were controversial. Indeed, Marshall's later opinion in *Foster v. Neilson* seems to abandon his more extreme claims about executive implementation of treaties.[164]

Extradition provisions returned in the 1842 treaty between the United States and Great Britain.[165] Once again, Congress did not pass a statute to implement the extradition provisions of the treaty, and the executive and courts approached the next several extraditions with heightened caution. In an opinion approving the extradition of Christiana Cochrane after a hearing before a commissioner, Attorney General John Nelson relied on Marshall's

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157. *See id.* at 615 (suggesting that in the course of the President's execution of a treaty, "judicial aid . . . may, perhaps, in some instances be called in").

158. *See id.* at 614; Wedgwood, *supra* note 144, at 339–40.

159. *See* Marshall, *supra* note 156, at 615; Wedgwood, *supra* note 144, at 349–51.

160. As Wedgwood observes, the House had already rejected the motion to censure Adams before Marshall spoke; his speech may have increased the margin of victory for the final vote. *See* Wedgwood, *supra* note 144, at 354.

161. *See id.* at 355.

162. *See id.* at 354–62.

163. *See* United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 314–20 (1936); H. Jefferson Powell, *The Founders and the President's Authority over Foreign Affairs*, 40 WM. & MARY L. REV. 1471, 1513–14 & nn.155–56 (1999) (collecting citations).

164. 27 U.S. (2 Pet.) 253, 314 (1829); *see* Wedgwood, *supra* note 144, at 365.

165. *See* Webster-Ashburton Treaty, Aug. 9, 1842, U.S.-U.K., 8 Stat. 572, 576; *see also* Parry, *supra* note 14, at 115–16 (discussing the treaty).

interpretation of *Robins* to assert that the executive branch did not require additional legislation to implement the 1842 treaty. He also declared that judicial involvement in extradition is "ancillary" to executive power, and that an extradition "is not a case in law or equity within the scope and meaning" of Article III.[166] In brief, the Attorney General relied on Marshall's arguments to claim that the treaty was self-executing as a grant of power to the President and that it contemplated no necessary role for the judiciary.

In re Sheazle provided the first judicial opinion on the 1842 treaty.[167] In this case, England sought the extradition of several fugitive sailors on piracy charges. After a hearing before a state magistrate, the sailors sought habeas relief. In his circuit court opinion denying habeas, Justice Woodbury first observed that the Judiciary Act of 1789 allowed state judicial officials "to examine and commit offenders in cases arising under the laws and jurisdiction of the United States."[168] The treaty, in turn, "seems to recognize and adopt the propriety of such an examination under it, 'by any judges or other magistrates' having power over similar inquiries."[169] As a result, Justice Woodbury avoided Judge Bee's jurisdictional holding by finding that state judicial officers had authority under the Judiciary Act to hear extradition cases under the treaty.[170] Justice Woodbury also suggested however, that treaties could sometimes be self-executing for the executive branch.[171]

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166. 4 Op. Att'y. Gen. 201, 208–11 (1843).

167. 21 F. Cas. 1214 (C.C.D. Mass. 1845) (No. 12,734).

168. *Id.* at 1216 (citing Judiciary Acts, § 33, 1 Stat. 73, 91 (1789)).

169. *Id.*

170. *Id.* at 1216–17.

171. Woodbury ruled there was no need for legislation to provide the President with authority to issue a warrant of surrender under the treaty and described two kinds of treaty provisions:

> Now, if a treaty stipulated for some act to be done, entirely judicial, and not provided for by a general act of congress, like that before cited, as to examinations such as here before magistrates, it could hardly be done without the aid or preliminary direction of some act of congress prescribing the court to do it, and the form. But where the aid of no such act of congress seems necessary in respect to a ministerial duty, devolved on the executive, by the supreme law of a treaty, the executive need not wait and does not wait for acts of congress to direct such duties to be done and how.

Id. at 1217. The hearing fell into the first category, while issuing a warrant fell into the second category. Treaty provisions that created tasks for courts required some implementing legislation, while provisions that gave power directly to the executive branch could be self-executing—at least for ministerial duties. (Many discussions of extradition in

The third and final case began when Nicholas Metzger was arrested for embezzlement and held under the 1843 extradition treaty with France.[172] Responding to a request from the French consul, District Judge Betts ruled that he had jurisdiction to determine whether Metzger could be extradited even though Congress had not passed a statute to implement the treaty.[173] Judge Betts conceded that the provision in the treaty, which allowed the executive branch to extradite with the "aid of judicial authority," did not confer jurisdiction because the courts could not act "without express authorization of law."[174] Instead, Judge Betts joined Justice Woodbury in avoiding Judge Bee's controversial assertion of jurisdiction. For Judge Betts, the Judiciary Act "allot[s] to the . . . district courts cognizance of all crimes and offences cognizable under the authority of the United States and accordingly, transactions declared by law to be offences occurring in foreign territories . . . fall necessarily within the criminal jurisdiction of those courts."[175] Having determined that the Judiciary Act provided jurisdiction, Judge Betts ruled that the treaty was a self-executing source of substantive law.[176]

Metzger petitioned the Supreme Court for a writ of habeas corpus. The Court noted that the sufficiency of the evidence for a warrant required a "judicial decision," and furthermore, was "very properly referred . . . to the judgment of a judicial officer."[177] Nonetheless, the Court ruled that it lacked jurisdiction over the petition. The reasoning in *Metzger* is opaque, but the decision rested in part on the lack of a clear statutory basis for jurisdiction in the district court, and even more so on the Supreme Court's supposed lack of statutory habeas jurisdiction.[178] Importantly, the Court's ruling relieved it of the need to examine the source of

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the mid-nineteenth century—especially before adoption of the extradition statute—assumed the executive's role in extradition was ministerial and did not include executive review. *See* Parry, *supra* note 14, at 150–53.) For additional discussion of *Sheazle*, see *id.* at 125 & n.171.

172. *See* Convention for the Surrender of Criminals Between the United States of America and His Majesty the King of the French, Nov. 9, 1843, U.S.-Fr., 8 Stat. 580, 582.

173. *In re* Metzger, 17 F. Cas. 232, 234–35 (C.C.S.D.N.Y. 1847) (No. 9,511).

174. *Id.* at 234.

175. *Id.* at 234 (discussing 1 Stat. 73, 76–77 (1789)). Judge Betts and Justice Woodbury relied on different sections of the Judiciary Act. *See supra* note 168.

176. *See id.* at 234–35.

177. *In re* Metzger, 46 U.S. (5 How.) 176, 188–89 (1847).

178. *See id.* at 191–92. For an extensive discussion, see Parry, *supra* note 14, at 127–34.

Judge Betts' jurisdiction and the relationship between the executive and the judicial branches in extradition cases. The Court simply affirmed the commonsense notion that judges should be involved in extradition proceedings without having to explain the basis for their involvement in any particular case.

The Supreme Court's avoidance strategy ultimately forced the issue onto Congress's agenda. Metzger next sought habeas from a state court judge, who found his confinement unlawful because "legislation is required to enforce the delivery, and secure the subsequent possession, of the fugitive."[179] Although pressure had been building for congressional action, the state court decision was the direct catalyst for the passage of an international extradition statute in 1848.[180]

The extradition statute, indeed, settled the jurisdiction question. Courts no longer were forced to interpret the Judiciary Act expansively to gain jurisdiction over extradition cases. Yet, the issue of jurisdiction was important enough to warrant revisiting by legal scholars later in the nineteenth century. In the most extensive discussion, Samuel Spear offered a forceful critique of each case. In the case of *Robins*, he argued that the treaty "needed legislation to make it operative" for either the executive or the courts to decide extradition cases,[181] and that neither Judge Bee nor President Adams had authority to carry out an extradition without additional legislation.[182] After discussing the 1843 Attorney General opinion and the *Sheazle* and *Metzger* cases, Spear criticized the doctrine of self-execution as placing too much power in the hands of the President. Furthermore, he declared that extradition treaties "address themselves to the legislative

179. *In re* Metzger, 1 Barb. 248, 261 (N.Y. Sup. Ct. 1847). The court made clear its conclusion that the self-execution doctrine would cede too much power to the executive. *See id.* at 262–63. For additional discussion, see Parry, *supra* note 14, at 118 & n.138, 135, 223.

180. *See* Parry, *supra* note 14, at 135 & n.223.

181. SAMUEL T. SPEAR, THE LAW OF EXTRADITION, INTERNATIONAL AND INTER-STATE 57 (3d ed. 1885).

182. *See id.* ("[T]he surrender of Robbins was without legal authority. The treaty gave Judge Bee no authority to make the surrender, and the President could give him none. The President himself had no such authority; and if he had, he did not directly exercise it.").

power of Congress, and are to be executed by its aid and co-operation."[183]

John Bassett Moore took a more sanguine view of what he termed "a speculative question, since general legislation on that subject is now provided."[184] His analysis began with the premise that the Supremacy Clause makes a treaty self-executing "whenever it is directly operative without the aid of the legislature," and proceeded directly to the conclusion that "[t]his has been held to be the case with extradition treaties."[185] Although Moore cited the relevant cases, he failed to distinguish between executive authority to execute a surrender warrant, jurisdiction to hear an extradition case, and the ability of an extradition treaty to operate as a rule of decision in a case. With the exception of *Robins*, none of the relevant cases suggests that extradition treaties are self-executing across the board, and Moore's analysis is flawed to the extent he meant to suggest such a sweeping rule.

This summary of early extradition cases confirms that using a treaty to create federal jurisdiction was controversial and largely disfavored in the early and mid-nineteenth century. History, thus, appears to dovetail with contemporary views on self-execution. Cases under the Supplementary Treaty do not address the issue of proper jurisdiction because they never squarely confront it. As a result, history supports and recent cases cannot disturb the conclusion that under current doctrine, federal courts should refuse appeals under the Supplementary Treaty until Congress passes appropriate legislation.

V. CONCLUSION

In a dramatic departure from ordinary practice, the Supplementary Treaty attempts to create federal court appellate jurisdiction without implementing legislation. This Article demonstrates that, consistent with prevailing views of self-execution, and to maintain congressional control of federal court jurisdiction, federal courts should refuse to enforce the appeal

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183. *Id. at* 61. Spear misunderstood *Sheazle* and *Metzger* to hold that no legislation was necessary to implement the 1842 treaty. *See id.* at 58–59. In fact, both cases held that legislation was necessary for purposes of jurisdiction but that existing statutes sufficed.

184. 1 JOHN BASSETT MOORE, A TREATISE ON EXTRADITION AND INTERSTATE RENDITION 99 (Fred B. Rothman & Co. 1996) (1891).

185. *Id.* at 100 (citing *Metzger*, *Rauscher*, *Robins*, and *Sheazle*, among other cases).

provisions of the Supplementary Treaty in the absence of an implementing statute.[186]

The history of extradition litigation also provides an additional lesson. In the years before the extradition statute, no federal court refused to hear an extradition case. Additionally, no court vacated an extradition decision on jurisdictional grounds. The *Sheazle* and *Metzger* courts made creative use of the Judiciary Act to get around the lack of specific implementing legislation. Their goal, presumably, was to prevent the frustration of important foreign affairs objectives and to ensure the nation would not be embarrassed by hindering treaty obligations.[187]

The assertion by federal courts of jurisdiction under the Supplementary Treaty should be seen as a contemporary version of this effort. If there is any way under existing statutes to support jurisdiction contemplated by a treaty, a proper concern for the foreign affairs interests of the United States requires federal courts to adopt that construction.[188] With respect to the Supplementary Treaty's appellate jurisdiction provisions, however, no eligible statute exists. Without a new statute or a change in the self-execution doctrine, federal courts cannot hear appeals under the Supplementary Treaty.

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186. Nor is there any reason to limit this conclusion to extradition. Extradition is a core foreign affairs subject and a traditional topic of treaty negotiation. If an extradition treaty cannot create federal court jurisdiction, a similar rule should apply to other treaties as well. As I already observed, however, my claim here is primarily descriptive. *See supra* note 131. The circumstances, if any, under which treaties should be able to create jurisdiction is a topic for another article.

187. *See* Peter J. Spiro, *Globalization and the (Foreign Affairs) Constitution*, 63 OHIO. ST. L.J. 649, 680 (2002) (describing judicial efforts to avoid embarrassing the United States on the international stage as "a persistent riff in foreign relations law doctrine"). Extradition proceedings have an inherent ability to embarrass the United States, as the events leading to the Supplementary Treaty demonstrate. *See supra* note 42 and accompanying text.

188. Federal courts should therefore assume, in the treaty context, that Congress intended to confer jurisdiction under existing statutes, even though in other contexts the presumption has been that Congress did not extend jurisdiction to the constitutional maximum. *See supra* notes 95–97 and accompanying text.